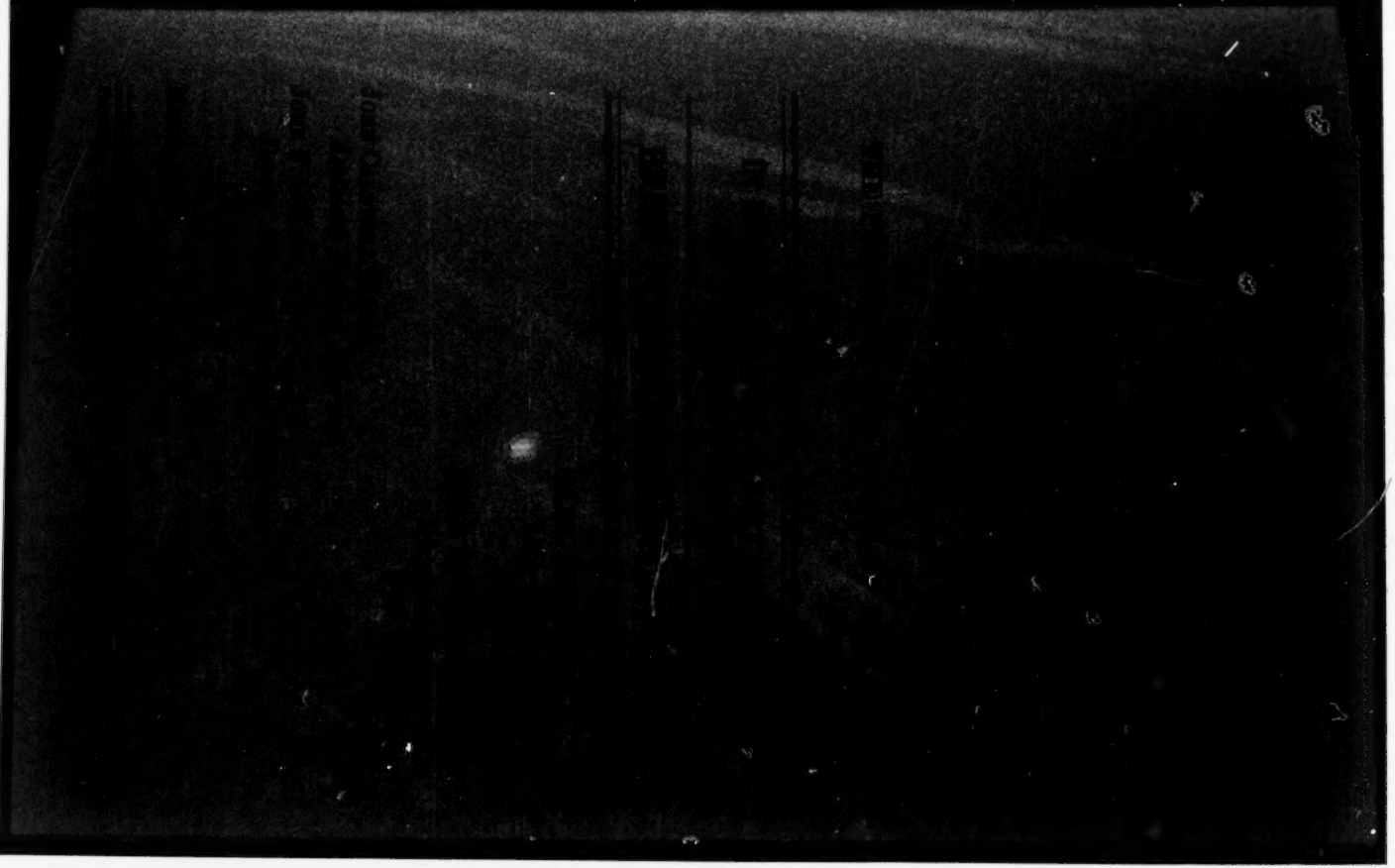

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Argued by
JOHN CALDWELL MYERS.

Supreme Court of the United States,

OCTOBER TERM, 1922.

BENJAMIN GITLOW, Plaintiff-in-error, *against* THE PEOPLE OF THE STATE OF NEW YORK, Defendant-in-error.	No. 770.

BRIEF FOR DEFENDANT-IN-ERROR.

Statement.

This is a writ of error to review a judgment of the Court of Appeals of the State of New York, affirming a judgment convicting the plaintiff-in-error of the crime of criminal anarchy (New York Penal Law, §§160, 161, subds. 1 and 2).

On February 11th, 1920, the plaintiff-in-error was convicted of the said crime in the New York Supreme Court, County of New York, Trial Term, Part I, after a trial before Mr. Justice Weeks and a jury, and judgment was pronounced whereby the defendant was sentenced to State Prison for not less than five years, nor more than ten years.

On April 1st, 1921, the Appellate Division of the Supreme Court of New York, First Department, rendered a judgment unanimously affirming the judgment of conviction (*People* v. *Gitlow*, 195 App. Div. 773).

On July 13th, 1922, the Court of Appeals of the State of New York rendered a judgment (two of the seven judges dissenting), affirming the judgment of the Appellate Division, (*People* v. *Gitlow*, 234 N. Y. 132).

(The two judges who dissented did not take the view that the statute was unconstitutional, but were of the opinion that the manifesto forming the basis of the prosecution did not constitute a violation of the statute).

The prosecution is based upon a publication made in the July 5th, 1919, issue of "The Revolutionary Age".

The plaintiff-in-error claims that the judgment of conviction should be reversed on the ground that the statute upon which the prosecution is based is violative of the due process clause of the Fourteenth Amendment.

The Statute.

The Penal Law provides:

"§160. Criminal anarchy defined.

Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony."

"§161. Advocacy of criminal anarchy.

Any person who:

1. By word of mouth or writing advocates, advises, or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the pro-

priety of the doctrines of criminal anarchy; or,

4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of persons formed to teach or advocate such doctrine,

Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

The indictment in the case at bar is drawn under §160 and subdivisions 1 and 2 of §161.

The Facts.

The facts are simple. The indictment found against the plaintiff-in-error was based upon his advocacy of the doctrines expressed and promulgated in the so-called "Left Wing Manifesto". This manifesto purported to be the manifesto of the Left Wing Section of the Socialist Party. It was published in the July 5th, 1919, issue of a paper known as The Revolutionary Age.

There was no dispute at the trial concerning the plaintiff-in-error's connection with the publication, nor of his advocacy of the doctrines and sentiments contained in the manifesto. It was conceded that the defendant was the business manager of "The Revolutionary Age"; that he was a member of the National Council of the Left Wing Section of the Socialist Party, which owned and controlled "The Revolutionary Age"; that he had knowledge of the publication of the manifesto and was legally responsible therefor; and that the manifesto was not only published with the plaintiff-in-error's knowledge, but the paper was circulated, sold and distributed with his knowledge and he conducted the negotiations for the printing of the paper and paid for the printing as the business manager and one of the owners (Transcript, p. 171).

While the plaintiff-in-error does not raise, and cannot raise in this Court, the contention that the manifesto in question does not fall within the ban of the New York criminal anarchy statute, a summary of the manifesto will be made an appendix to this brief. The manifesto is set out in full in the indictment (Transcript, pp. 14-48). Copies

of the issue of "The Revolutionary Age" for July 5th, 1919, will be submitted to the Court at the argument, if the Court desire to receive them.

The defendant-in-error has stipulated with the plaintiff-in-error to abridge the printed record by omitting much of the matter that was contained in the printed records used in the Appellate Division of the New York Supreme Court and in the Court of Appeals. The omitted matter will not aid this Court in passing upon the constitutionality of the Statute, which is the only question raised here.

The Real Question Involved.

At the outset, it may be well to dispose of certain contentions made by the plaintiff-in-error. He contends, in effect, that he has been tried and convicted merely because he entertained certain political beliefs which are contrary to the beliefs entertained by the majority of our citizens—in other words, that he has been convicted of heresy, political heresy, and not for the commission of a crime. It is urged that the New York criminal anarchy statute is void because it places its ban upon doctrine as such; and that what the plaintiff-in-error did was, at most, a political offence, which could not be made punishable as a crime.

These contentions are wholly erroneous. The criminal anarchy statute does not place its ban upon the doctrine defined therein, but upon the *advocacy* of that doctrine. The plaintiff-in-error was not tried for heresy. He was tried and convicted because he *advocated* the doctrine that organized government should be overthrown by force or violence or by some unlawful means, and not because he *believed* in that doctrine. It is wholly immaterial whether the plaintiff-in-error believed or disbelieved in the doctrine which he advocated. Having advocated the prohibited doctrine, he was guilty of a violation of the statute, even if he did not believe in the doctrine. If he had not advocated the doctrine, he would have been guilty of no crime, even if he believed in the truth of the doctrine.

We repeat that the plaintiff-in-error was tried and convicted of the substantive offence of *advocating criminal anarchy*, and was neither tried nor

convicted for entertaining a belief that the doctrine which he advocated was in fact the true doctrine.

The contention that what the plaintiff-in-error has done renders him a mere political offender does not merit serious consideration. Our conception of political action involves the idea of legitimate activities. One who violates the law, or one who does a criminal act in relation to a matter which is the subject of legitimate political action, cannot claim immunity or even special consideration on the theory that his offence is a political and not a criminal one. Our laws recognize no aristocracy in crime. A person who violates a valid penal statute is a criminal—whether the criminal act be done in relation to a political or a non-political activity.

The real question involved on this appeal is not whether the right of free speech may be restricted or abridged, but whether criminal responsibility may be imposed for an abuse of the right of free speech. We shall endeavor to establish the proposition that the statute involved in this case is a legitimate exercise of the State's police power and that it does not violate the due process clause of the Fourteenth Amendment. Opinions may differ as to the wisdom of enacting statutes of this character; but that question is one for the Legislature to determine, and we submit that it cannot be considered on this appeal.

POINT I.

An abuse of the right of free speech may be declared a crime.

The brief for plaintiff-in-error contains a very interesting discussion—much of it historical, much of it philosophical—of the right of free speech. We shall not discuss that question at all. We shall confine our discussion to the power of the State to punish abuses of the right of free speech. We rely upon two propositions: (1) that the State has power to make it a crime to abuse the right of free speech; and (2) that the statute under consideration constitutes a valid exercise of that power.

We take it that the first proposition cannot be disputed. Part of the price which a person pays for the privilege of being protected by a civilized government is that he surrenders his abstract right to complete freedom of speech. He may speak freely, but he is liable to punishment if he says that which is injurious to another or to the public welfare.

The Constitution of the State of New York contains the following provisions:

Article 1, Section 8:

> "Every citizen may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right;* and no law shall be passed to restrain or abridge the liberty of speech or of the press."

This does not confer a right upon citizens to say and write whatever they please under all circumstances, with impunity.

The grant of the right of free speech is coupled with the reservation of the right *to hold the citizen liable for his abuse of the right granted. The right granted* to the citizen cannot be separated from the *right reserved* by the State. In other words, the guaranty of the right of free speech is a conditional one. The condition is that the granted right cannot be abused with impunity.

The liability of the citizen for abusing the right of free speech is not limited to civil responsbility, but extends to criminal responsibility as well. If he says or publishes that which is inimical to the public welfare, he is liable to criminal prosecution.

In short, the Constitution of the State of New York places no restriction upon the power of the Legislature to punish writings or speeches which are injurious to society or an incitement to violence and disorder.

People v. *Most*, 171 N. Y. 423.
Robertson v. *Baldwin*, 165 U. S. 275, 281.
Schenck v. *U. S.*, 249 U. S. 47, 52.
Frohwerk v. *U. S.*, 249 U. S. 204.

We take it that it requires neither argument nor citation of authority to demonstrate that the due process clause of the Fourteenth Amendment is not violated by a State statute which is a reasonable exercise of the police power—that is, by a statute which punishes as an abuse of free speech that which is in fact a punishable abuse.

Our task, then, will be to show that the New York criminal anarchy statute is a valid exercise of the State's police power to punish abuses of the right of free speech.

Before proceeding to a discussion of the validity of the statutes under consideration, we desire to suggest that utterances, so far as the power to punish is concerned, may be divided into three classes:

a. Some utterances are not punishable as such under any circumstances. For example, a man may assert with impunity that the moon is made of green cheese;—although, of course, he may be guilty of disorderly conduct if he makes the assertion loudly and repeatedly in a place of public worship, for instance.

b. Some utterances are punishable only when they are made under such circumstances as to incite the hearers to do that which the law forbids and there is imminent danger that they will bear fruit in actual violations of the law. An example of this class of utterances is found in those prohibited by the Espionage Act.

c. Some utterances are so inherently inimical to the public welfare that they are *per se* abuses of the right of free speech and may be made punishable as such. Among utterances falling within this class are those which constitute criminal libel, for example. It is our contention that this category includes utterances advocating the doctrine that organized government should be overthrown by force, violence or any unlawful means.

POINT II.

The New York Criminal Anarchy Statute (New York Penal Law §§160, 161 Subdvs. 1 and 2) is constitutional. It does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

We now come to a discussion of the question of whether the New York criminal anarchy statute (Penal Law §§160, 161, Subdvs. 1 and 2) is constitutional. Section 160 defines criminal anarchy as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any executive officials of government, or by any unlawful means."

Section 161 creates the crime of advocating criminal anarchy and prescribes the punishment for that crime. It provides, in Subdivisions 1 and 2, that any person who advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head, or of any executive officials of government, or by any unlawful means, or who prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form containing or advocating, advising or teaching the unlawful doctrine, is guilty of a felony and punishable by imprisonment for not more than ten years or by a fine of not more than $5,000, or both.

The Appellate Division of the Supreme Court of New York, in its opinion in this case (*People* v. *Gitlow,* 195 App. Div. 773, 785, 790, 791), construed this statute as making it a crime to advocate, within the State of New York, the overthrow of the Government of the United States, or of any State in the Union, by any means or methods other than constitutional means or methods, and as prohibiting the initial and every other act knowingly committed for the accomplishment of that purpose; and as so construed, held the statute to be constitutional. That Court was of the opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom had no application to the statute under consideration and that, therefore, the statute need not be construed, and should not be construed, as being limited in its application to advocacy of the unlawful doctrine under such circumstances that the apprehended danger is present or immediate. Neither of these points was expressly discussed in either of the majority opinions in the Court of Appeals (*People* v. *Gitlow,* 234 N. Y. 132), but we may safely assume that they met with the approval of the majority of that Court who voted for the affirmance of the judgment of the Appellate Division.

We stand squarely and flatly on the opinion rendered by the Appellate Division. We accept unreservedly the broad construction given the statute by that Court, and assert with confidence that the statute, as thus construed, is constitutional. We believe that it was competent for the State of New York to make it a crime to advocate the overthrow of organized government by any

means other than the lawful and orderly means of the ballot, and to make the knowing advocacy of the unlawful doctrine a crime of itself irrespective of whether the danger of resulting injury therefrom is imminent or remote. We base this belief upon the fundamental principle that the right of the individual to speak freely does not extend so far as to render him immune from punishment if he says that which is inherently inimical to the public welfare.

In *Turner* v. *Williams* (194 U. S. 279, 294), this Court, in upholding the constitutionality of a statute providing for the exclusion of aliens who believe in or advocate the overthrow by force or violence of the Government of the United States or of all governments, said:

> "As long as human governments endure, they cannot be denied the power of self-preservation."

It seems to us to be clear that the statutes under consideration constitute a proper exercise by the Government of the State of New York of its power of self-preservation.

If organized government is to endure, it must have the right to protect itself against any form of extra-parliamentary attack—that is, any form of unlawful attack—upon its existence.

The police power certainly extends to the protection of the State itself, as well as to the citizens of the State. What would an organized government amount to if it lacked the power of self-protection? Of what use would it be to have power to protect the individual, if the government upon which he relies for protection is helpless to protect itself?

The principles justifying the New York criminal anarchy statute were admirably stated in *People* v. *Most* (171 N. Y. 423), which was a prosecution instituted prior to the enactment of that statute. We quote from that opinion at pages 430-432:

> "The Constitution of our state provides that 'every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.' (Art. 1, §8.)
>
> While the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature. The punishment of those who publish articles which tend to corrupt morals, induce crime or destroy organized society, is essential to the security of freedom and the stability of the state. While all the agencies of government, executive, legislative and judicial, cannot abridge the freedom of the press, the legislature may control and the courts may punish the licentiousness of the press. 'The liberty of the press,' as Chancellor Kent declared in a celebrated case, 'consists in the right to publish, with impunity, truth, with good motives, and for justifiable ends, whether it respects governments, magistracy or individuals.' (*People* v. *Croswell*, 3 Johns. Cas. 336, 393.) Mr. Justice Story defined the phrase to mean 'that every man shall have a right to speak, write and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property or reputation; and so always, that he does not thereby disturb the public peace,

or attempt to subvert the government.' (*Story's Commentaries on the Constitution,* §1874.)

The Constitution does not protect a publisher from the consequences of a crime committed by the act of publication. It does not shield a printed attack on private character, for the same section from which the above quotation is taken expressly sanctions criminal prosecution for libel.

"It does not permit the advertisement of lotteries, for the next section prohibits lotteries and the sale of lottery tickets. It does not permit the publication of blasphemous or obscene articles, as the authorities uniformly hold. (*People* v. *Ruggles,* 8 Johns. 290, 297; *People* v. *Muller,* 96 N. Y. 408; *In re Rapier,* 143 U. S. 110.) It places no restraint upon the power of the legislature to punish the publication of matter which is injurious to society according to the standard of the common law. It does not deprive the state of the primary right of self-preservation. It does not sanction unbridled license, nor authorize the publication of articles prompting the commission of murder or the overthrow of government by force. All courts and commentators contrast the liberty of the press with its licentiousness, and condemn as not sanctioned by the constitution of any state, appeals designed to destroy the reputation of the citizen, the peace of society or the existence of the government. (*Story on the Const.* §1878; *Cooley on Constitutional Limitations,* 518; *Ordronaux on Constitutional Legislation,* 237; *Tiedman on Police Powers,* §81.)"

The statute does not place a ban upon doctrine as such.

One of the points raised in behalf of the plaintiff-in-error is that the criminal anarchy statute

is invalid in that it places a ban upon doctrine as doctrine.

This is a misconception of the purpose and effect of the statute. The ban of the statute is not upon a doctrine, but upon the *advocacy* of a doctrine. The statute does not make *belief* in the prohibited doctrine unlawful. What the statute does and all that it does is to make it unlawful to *advocate* the doctrine that organized government should be overthrown by force, or violence, or any unlawful means.

A person may believe in the false doctrine without violating the law. No doubt, he may even express the opinion that the prohibited doctrine is a true one, without violating the law, provided he expresses his opinion in such a way as not to incite others to practice the doctrine. But the moment he *advocates* the duty, necessity or propriety of practicing the doctrine, he does what the law prohibits; and he is guilty of a crime even if he does not himself believe in the doctrine advocated. If a believer in the doctrine of criminal anarchy translates his belief into action by advocating the practice of the doctrine, he does an overt act—incites others to do that which is unlawful—and thereby commits the crime of advocating the doctrine of criminal anarchy. In that case, however, he is rendered guilty not by his belief in, but by his advocacy of, the doctrine.

To summarize: The punishment is imposed for an *act* and not for a *belief*. When a person advocates the prohibited doctrine, he does an act which the statute says is unlawful. If he believes without acting—that is, without advocating—he does nothing unlawful. But if he acts—advocates the prohibited doctrine—he violates the statute,

whether he believes or disbelieves in the doctrine advocated.

Necessity of imminent danger.

Perhaps the chief point relief upon by the plaintiff-in-error is that the criminal anarchy statute is unconstitutional because it takes no account of circumstances. It is argued that liberty of expression may be restrained only in circumstances where its exercise bears a causal relation to some substantive evil consummated, attempted or likely.

The position of the plaintiff-in-error seems to be, to state it bluntly and tersely, that the Fourteenth Amendment to the Federal Constitution gives him the right to advocate the overthrow of the government of the State of New York by force or violence or such other unlawful means as he may choose, and that the state government is without power to take any steps to protect itself until such time as militant steps are taken to accomplish the actual overthrow of the government. In other words, the plaintiff-in-error claims that he is entitled to the protection of the Constitution of the United States in his plans to overthrow organized government in one of the States of the Union until his plans have reached the point where there is imminent danger that they will be executed.

It seems to us that the mere statement of the proposition demonstrates its falsity and absurdity. It is true that some utterances which constitute punishable abuses of the right of free

speech become such only when the natural tendency and reasonably probable effect of the words used are to accomplish the evil which it is the purpose of the statute to guard against, or when the danger to be apprehended is present or imminent. The reason for that rule is that the utterances may be dangerous to the public welfare, or not dangerous, according to the time, place or other circumstances at which, or under which, they are made. For example, many things which might be said freely in time of peace would be punishable abuses of free speech if said in time of war.

But, on the other hand, an utterance may constitute an act or be an inseparable part of an act which is inherently inimical to the public welfare. In that case, it is *per se* an abuse of the right of free speech and may be made punishable as such. We submit that an utterance advocating the doctrine of criminal anarchy is of that character.

Criminal anarchy is a dangerous doctrine at *any* time. Its advocacy imperils the life of the state, no matter *when* it is made. The doctrine of criminal anarchy is so inherently dangerous that it is competent for the State to forbid the advocacy of that doctrine absolutely, without regard to whether there is imminent danger that the advocacy will result in the taking of actual steps to carry out the doctrine advocated.

The existence of some grave emergency, such as a state of war, may be necessary ordinarily to justify a *curtailment* of the right of free speech. But the power to punish such an *abuse* of the right of free speech as advocacy of the doctrine of criminal anarchy may be exercised at any time.

We respectfully submit that it was competent for the Legislature of the State of New York to declare that *under no circumstances* is the doctrine to be advocated that organized government should be overthrown by force, violence or any unlawful means.

It certainly cannot be contended that where a group of persons are deliberately advocating the doctrine that organized government should be overthrown by unlawful means, and are pointing out specifically definite steps for the accomplishment of that purpose, the government against which the action is contemplated can take no steps to protect itself by checking the movement before it has gone too far. It cannot be that the Government is powerless to act until the plotters have perfected their plans and are ready to strike the fatal blow. If the Government were bound to delay its action until the arrival of the time for the striking of the blow, it might then be too late, and the Government might perish because of its failure to take seasonable protective measures. The time to kill a snake is when it is young.

In the opinion in this case in the Appellate Division (195 App. Div. 773, 790, 791, 792), Mr. Justice Laughlin made the following admirable statement of the law on this subject:

> "So zealously do the courts uphold the constitutional provisions relating to the freedom of speech and of the press and to personal liberty, that they construe legislation designed to prevent the abuse of those rights so as to prohibit only what is essential to prevent the abuse at which the statutes are aimed (*State* v. *Fox, supra* [71 Wash. 185; 236 U. S. 273]); and the courts in construing such

statutes have in some instances said that the danger to be apprehended from a doctrine, the advocacy of which is lawfully and constitutionally forbidden, must be present or immediate (*Schenck* v. *United States,* supra, [249 U. S. 47]); *Masses Pub. Co.* v. *Patten,* 244 Fed. Rep. 535; revd., 246 id. 24; *Colyer* v. *Skeffington,* 265 id. 17); and in other decisions it is stated that a question of proximity and degree is involved, and that the 'natural tendency and reasonably probable' effect of the words used must be to accomplish the evil which it is the purpose of the statute to guard against. (*Debs* v. *United States,* 249 U. S. 211; *Commonwealth* v. *Peaslee,* 177 Mass. 267; *Abrams* v. *United States,* 250 U. S. 616, dissenting opinion by Mr. Justice Holmes at p. 627; *Schaefer* v. *United States,* 251 id. 466; *Pierce* v. *United States,* 252 id. 239.) I am of opinion that the common-law theory of proximate causal connection between the acts prohibited and the danger apprehended therefrom, which is the basis of the comments of the courts to which reference has been made, has no application here. The articles in question are not a discussion of ideas and theories. They advocate a doctrine deliberately determined upon and planned for militantly disseminating a propaganda advocating that it is the duty and necessity of the proletariat engaged in industrial pursuits to organize to such an extent that, by massed strike, the wheels of government may ultimately be stopped and the government overthrown, and all public and private property expropriated and nationalized and administered for a time through a proletarian dictatorship and thereafter, in some manner not very definitely disclosed, administered by and for the entire proletariat. I cannot subscribe to the doctrine that it is not competent for the Legislature to forbid the advocacy of such a doctrine designed and

intended to overthrow government in this manner, until it can be shown that there is a present or immediate danger that it will be successful, for such legislation would afford no adequate protection against the apprehended danger, because it is evident that the organization of the proletariat as advised and urged, and the spread of the pernicious doctrine, are to be effected in the main secretly; for we are not informed who is to determine when the time for massed strikes will be ripe or who is to call them, and it is evident that a law so limited might only become effective simultaneously with the overthrow of government, when there would be neither prosecuting officers nor courts for the prosecution and punishment of the crimes. In so far, therefore, as it is competent for the Legislature to enact laws to prevent the overthrow of government by unauthorized means, I am of opinion that the initial and every other act knowingly committed for the accomplishment of that purpose may be forbidden and declared to be a crime. We must assume that the Legislature deemed that, unless the advocacy of such a doctrine was prohibited, there was danger that sooner or later the government might be overthrown thereby. That, I think, was sufficient to warrant the enactment of the statute. I know of no right on the part of the aliens who are members of the Left Wing and here merely by sufferance of our government, to advocate the overthrow our constitutional form of government by unlawful means; and surely naturalized citizens who have sworn to uphold the Constitution have no right to advocate its overthrow otherwise than through the ballot box and as provided for its amendment, nor have native-born citizens of alien parentage, such as the appellant is, or any other citizen, such right, and they should not be heard to invoke the protection of the Constitution against their

prosecution for acts, deliberately performed, calculated and intended to overthrow and nullify it by unauthorized means. (See State *v.* Gilbert, supra [141 Minn. 263; 254 U. S. 325].) The doctrine's advocates are not harmless. They are a menace, and it behooves Americans to be on their guard to meet and combat the movement, which, if permitted to progress as contemplated, may undermine and endanger our cherished institutions of liberty and equality. But if immigration is properly supervised and restricted and the people become aroused to the danger to be apprehended from the propaganda of class prejudice and hatred—by a very small minority mostly of foreign birth, which has for its object not only the overthrow of government but the destruction of civilization and all the innumerable benefits it has brought to mankind—there can be no doubt but that the God-fearing, liberty-loving Americans both in the urban and rural communities, who appreciate the equal opportunities for all for bettering their status and for advancement afforded by our constitutional form of government, under which the majority rule, and have made and are making sacrifices to improve their condition and that of their families, and to accumulate property for themselves and those who come after them, will see to it that these pernicious doctrines are not permitted to take root in America. Since it is competent for the Legislature to enact laws for the preservation of the State and Nation, the laws required for that purpose rest in the legislative discretion, and if they are reasonably adapted to that end and are based on danger reasonable to be apprehended, even though not present or immediate, they may not be annulled by the courts either on the theory that it would be wiser to leave it to the people to meet the pernicious doctrines by argument, or that

they unnecessarily restrict the freedom of speech or of the press or of personal liberty. The Legislature within its authority has spoken for the People, and it is the duty of the courts to enforce the law."

In *Ex parte Bollman* (8 U. S. [4 Cranch] 74, 126), this Court said per Marshall, C. J.:

"Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation, by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe, that punishment, in such cases, should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe, as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition, should receive such punishment as the legislature in its wisdom may provide."

We do not advance a novel doctrine when we assert that an utterance may be so inherently inimical to the public welfare as to be *per se* a punishable abuse of free speech. Several instances of utterances falling within that class suggest themselves readily. Perhaps the most obvious one is that of criminal libel. A malicious libel which tends to expose the person concerning whom it is published to contempt, disgrace or obloquy is indictable as a crime. Criminal libel is punishable, not because it inflicts an injury, but because it may provoke a breach of the peace. So criminal anarchy may be punished because its advocacy operates of itself to imperil the very existence of the State—of organized government. The danger of a breach of the peace resulting from criminal libel need not be imminent. Nor need the danger of overthrow of organized government resulting from the advocacy of criminal anarchy be imminent.

Perjury affords another example of an utterance which is *per se* an abuse of free speech. If a sworn witness testifies falsely as to a material fact in issue, he may be prosecuted and punished irrespective of whether the false testimony given by him influences the verdict.

Some statutes (*e. g.*, N. Y. Penal Law §764, subd. 4) make it a crime to electioneer on Election Day within a specified distance of a polling place. Of course, electioneering usually involves the use of speech. It is a crime to do the prohibited act even if it does not influence the votes of the electors who are approached by the offender.

If we concede, for the sake of argument, that the proper construction of the New York criminal

anarchy statute is that it is applicable only to utterances made under certain circumstances,—that it is applicable only where there is imminent danger that concrete substantive injury will result from the advocacy of the prohibited doctrine,—we nevertheless submit that the manifesto, for the publication of which the plaintiff-in-error has been convicted, constitutes a violation of the statute as thus construed.

The manifesto advocates *the conquest and destruction of the State,* and after that has been accomplished, the temporary establishment of a dictatorship of the proletariat, which in turn is to be succeeded ultimately by a so-called government of production and not of persons,—by the "full and free social and individual autonomy of the communist order". Mass action finding expression in a general strike is the means advocated for the overthrow, conquest and destruction of the existing organized government. The manifesto made it plain that it is proposed not merely to capture what is termed the bourgeois state, but to conquer and destroy it (Transcript, pp. 103-111, 123, 125, 129-136).

It is apparent, from an examination of the manifesto, that the intent was to incite the readers to use unlawful means to bring about the conquest and destruction of the existing government, and to do this *forthwith.* It is clear that the manifesto contemplated action immediately or in the near future.

The imminence of the danger that unlawful action will result from advocacy of the doctrine of criminal anarchy cannot be measured mathematically. "Imminent" does not necessarily mean the next moment.

If A says, "Oh, I think the government should be overthrown by force", but makes no definite suggestion as to when and how, there is no imminent danger. But if he says, "We must overthrow the government by force; let us do this by mass action; now is the time to act"—and points out the form that mass action shall take and the steps that should be taken to conquer and destroy the existing government, *the danger is imminent.*

That the action advocated by the plaintiff-in-error was not in fact taken is not material, and does not prove that the danger was not imminent; it merely shows that the State wisely acted in self-defence before it was too late. In *Schenck* v. *United States* (249 U. S. 47)—it was held that the circulation of a document for the purpose of obstructing the draft was a violation of the Espionage Act, even though the circular did not succeed in accomplishing the purpose for which it was published and circulated. The principle involved in that decision is applicable to the question under present consideration.

Restraint upon free expression of political opinion.

A considerable portion of the brief of plaintiff-in-error is devoted to an attempt to show that the statute under consideration is void because its purpose and effect is to punish, and therefore limit, free discussion of political questions.

It is obvious that there is no merit whatever in this contention.

Undoubtedly, our theory of government demands that the utmost possible freedom shall be

accorded everyone in the expression of political opinions. A person has the right to advocate drastic changes in our form of government, even to the extent of advocating the overthrow of the existing government or the abolition of all organized government, provided he proposes to bring about the desired changes through the action of the electorate by means of the use of the ballot. But the right to express political opinions freely does not extend to or include the right to advocate the overthrow of the existing government or the destruction of organized government by the use of unlawful means.

The doctrine of criminal anarchy is not a political doctrine. If it were, it would find expression in political action, and not in deeds of violence. Under our system of government, political action is action taken in the manner authorized by law for the purpose of affecting government or governmental affairs. Advocacy of the doctrine of criminal anarchy is not political action. Criminal anarchy seeks to make political action impossible—indeed, to do away with the only thing which political action can affect, or upon which it can operate, namely, organized government.

Ours is a popular government. Our government is conducted according to the will of the majority. When the majority, by their vote, decide any political question, the minority must submit to the popular will. Popular government—government chosen by a majority of the people—is one of the greatest gifts from modern civilization to mankind. It is monstrous to say that anyone living under our government has a constitutional right to advocate with impunity the doctrine that a

minority of the people have the right to overthrow our government by unlawful means.

The plaintiff-in-error and his associates in the communistic movement form a small but militant and dangerous minority in this country. They intend, if possible, to impose their views and their will on the majority. They are determined to substitute rule by the minority—*their* minority—for rule by the majority, for popular rule. If the majority of the people wanted to abolish organized government, they could do so by their vote. The plaintiff-in-error and his associates know that public sentiment is overwhelmingly opposed to them and their aims, and therefore they seek to accomplish their ends by force, violence or other unlawful means. Clearly, advocacy of measures of that nature is not entitled to constitutional protection as the expression of political opinion.

The distinction between the right to express political opinions and advocacy of the doctrine of criminal anarchy was clearly expressed in the following words by Chief Judge Hiscock of the Court of Appeals in his opinion in this case (*People* v. *Gitlow,* 234 N. Y. 132, 151):

> "Every intelligent person recognizes that one of the great rights secured to the citizens of this country is that of free and fearless discussion of public questions including even the merits and shortcomings of our government. It would be intolerable to think that any attempt could be successfully made to impair such right. But the difference between such forms of discussion and the advocacy of the destruction of government itself by means which are abhorrent to the entire spirit of our institutions is so great that we deem it entirely unnecessary to support at length the

proposition that the Legislature of this state may prohibit the latter without infringing the former."

In *In Re Lithuanian Workers' Literature Soc.* (187 N. Y. Supp. 612, 614-615), the Court said:

"The publication of literature is, of course, an exercise, and perhaps the most common and effective one, of the right of free speech. That right does not embrace the right to advise or encourage attempts to overthrow by force existing government; that is, by what is commonly spoken of as revolutionary methods. Indeed, the Penal Law of this state (Consol. Laws, c. 40), sections 160 and 161, makes advising or teaching 'by word of mouth or writing * * * the duty, necessity or propriety of overthrowing or overturning organized government by force or violence' a felony, punishable by imprisonment from five to ten years, or by a fine of not more than $5,000, or both. It is not the province of this court in any of its departments to set itself up as a censor of the tastes, social or political, of the people. However repugnant to our minds and consciences the Socialist program may be, we are not to stand in the way of organizations to promote its accomplishment, provided only it is clear that the purpose and intent of those organizations is to seek the accomplishment of that program by lawful methods; that is to say, to change our form of government by amending the Constitution through constitutional methods. It may be remarked, in passing, that whatever may have been or may now be the situation in any other country, there can be in this country no sort of moral excuse even for advocacy of a resort to any other means of effecting such change. By the adoption of the Prohibition and Universal Suffrage Amendments we have recently had very striking examples of the practical

ease and celerity with which our Constitution may be radically amended."

The wisdom of the statute.

For the reasons which we have set out hereinbefore, it seems to be clear that the New York criminal anarchy statute is a valid exercise of the State's police power to punish an abuse of the right of free speech.

Opinions may differ as to the wisdom of passing statutes of this character. It may be that from the standpoint of expediency it might be wiser to have a statute which provides for the punishment of the advocacy of criminal anarchy only in those cases where it can be shown that there is imminent danger that concrete substantive injury will result from the advocacy of the unlawful doctrine, on the theory that if our government is to endure we must rely on the good common sense of our citizens to reject false doctrine in respect to government.

But we submit that the question of the wisdom and expediency of the statute was one for the Legislature to determine and that it cannot be considered on this appeal. All that concerns this court is the question whether the statute infringes the Constitution of the United States.

Fox v. *Washington*, 236 U. S. 273, 278.

POINT III.

Similar statutes have been upheld in other jurisdictions.

We have thus far based our argument in support of the constitutionality of the criminal anarchy statute upon principle. It seems to us that the statute is so clearly a justifiable exercise of the State's police power that it may be unnecessary for us to support our argument by the citation of reported cases which have upheld statutes of a similar nature. But since authorities are not wanting, we shall refer to some of them.

California.

In *People* v. *Stellik* (203 Pac. 78), the Supreme Court of California, in sustaining the validity of the criminal syndicalism statute of that State, said that the right of free speech does not include the right to advocate the destruction or overthrow of government or the criminal destruction of property, and that the Legislature has power to punish propaganda which has for its purpose the destruction of government or the rights of property which the government was formed to preserve. See, also, *People* v. *Malley*, 194 Pac. 48, and *Ex Parte McDermott*, 183 Pac. 437, upholding the same statute.

Connecticut.

In *State* v. *Sinchuk* (96 Conn. 605, 115 Atl. 33, 20 A. L. R. 1515), the Court upheld the Connecticut statute entitled, "An act concerning sedition." The statute penalized three classes of

publications, including those "which create or foster opposition to organized government." One of the objections which the court considered and rejected as being unsound was that the act "penalized expression for its character regardless of relation or harmful consequence."

Minnesota.

In *State* v. *Moilen* (Minn.), 167 N. W. 345, 1 A. L. R. 331, it was held that the Minnesota statute declaring and defining the crime of criminal syndicalism, and prohibiting the advocacy or teaching of sabotage or other methods of terrorism as a means of accomplishing industrial or political aims, is not obnoxious to either the State or the Federal Constitution.

New Jersey.

In *State* v. *Quinlan,* 86 N. J. Law 120, 91 Atlantic 111, and *State* v. *Boyd,* 86 N. J. L. 75, 91 Atlantic 586 (affirmed without opinion in 87 N. J. L. 328,—93 Atlantic 599), the Courts passed upon the validity of the New Jersey statute providing that "any person who shall, in public or private, by speech, writing, printing, or by ony other mode or means, advocate, encourage, justify, praise or incite the unlawful burning, destruction of public or private property or advocate, encourage, justify, praise and incite the killing or injuring of any class or body of persons or of any individual, shall be guilty of a High Misdemeanor."

In each of the New Jersey cases just cited, the validity of the statutes was upheld as against the objection that it violated the State Constitution in that it restrained and abridged liberty of speech.

In *State* v. *Boyd*, 86 N. J. L. 75, 91 Atlantic 586, the Court said:

> "The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and breaches of the public peace, is an abuse of the right of free speech, for which, by the very constitutional language invoked, the utterer is responsible."

Washington.

In *State* v. *Fox* (71 Wash. 185, 127 Pacific 1111, affd. 236 U. S. 273) it was held that the Washington statute making it a criminal offense to edit or publish an article "advocating, encouraging, or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace, or act of violence, or which shall tend to encourage or advocate disregard for law or for any Court or Courts of Justice," is not violative of the constitutional provisions relating to the freedom of the press.

In *State* v. *Hennessy* (114 Wash. 351, 195 Pac. 211), the Supreme Court of Washington upheld the validity of a statute of that State commonly known as the "Criminal Syndicalism" statute (L. 1919, p. 518). That statute made it a felony (1) to "advocate, advise, teach or justify crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change," or (2) to "print, publish, edit, issue or knowingly sell, circulate, distribute or display, any book, pamphlet,

paper, handbook, document, or written or printed matter of any form, advocating, advising, teaching or justifying crime, sedition, violence, intimidation or injury as a means or way of effecting or resisting any industrial, economic, social or political change."

In the *Hennessy* case, it was held that the "Criminal Syndicalism" statute was not unconstitutional as abridging freedom of speech. It was also held that the fact that treason is defined in the Federal Constitution does not deprive the State Legislature of the power to enact a statute which is intended to prevent the teaching of crime, sedition, violence or intimidation as a means of overcoming or destroying the present social order.

Oregon.

In *State* v. *Laundy* (204 Pac. 958; rehearing denied in 206 Pac. 290), the Supreme Court of Oregon held that no constitutional right, federal or state, was violated by the Syndicalism Act of that State.

(We may point out here that the decision construing the first Washington statute—*State* v. *Fox, supra*—was rendered in 1912, and that the decisions construing the New Jersey Statute—*State* v. *Quinlan* and *State* v. *Boyd, supra*—were rendered in June, 1914, and July, 1914, respectively. We point this out for the purpose of showing that the Washington and New Jersey statutes, as well as the New York statutes under consideration, were passed prior to the commencement of the Great War.)

New Mexico.

In *State* v. *Diamond* (202 Pac. 988, 20 A. L. R. 1527), the Supreme Court of New Mexico held that a State statute prohibiting acts which have for their object the destruction of organized government was unconstitutional as violative of the right of free speech guaranteed by the State Constitution. That statute, however, provided that it should be unlawful for any person or persons to commit or perform or to cause to permit or to be performed "*any act of any kind whatsoever* which has for its purpose or aim the destruction of organized government, federal, state or municipal, or to do or cause to be done any act which is antagonistic to or in opposition to such government, or incite or attempt to incite revolution or opposition to such organized government". The basis of the court's decision was that the offences enumerated in the statute were not confined to acts of violence or force or other unlawful things, but included all acts, peaceful or otherwise, which had for their object the destruction of organized government by acts antagonistic to or in opposition to such organized government. The Court pointed out that under the terms of the statute no distinction was made between the man who advocates a change in the form of our government by constitutional means, or advocates the abandonment of organized government by peaceful methods, and the man who advocates the overthrow of our government by armed revolution, or other form of force or violence.

The New York statute is free from the vice of the New Mexico statute.

In Conclusion.

We respectfully submit that the New York criminal anarchy statute (New York Penal Law, §§160, 161, subds. 1 and 2) is constitutional and does not violate the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The judgment convicting the plaintiff-in-error of the crime of criminal anarchy should be affirmed.

Respectfully submitted,

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March, 1923.

APPENDIX.

The following is a summary or synopsis of the most important parts of the Left Wing Manifesto, which was published in The Revolutionary Age of July 5th, 1919, and which affords the basis for the indictment.

In the very beginning of the article on page 6 of "The Revolutionary Age" there is the announcement that the world is in crisis; that socialism itself is in crisis; that communist socialism is developing, and that the struggle between capitalism and communist socialism is NOW (this means the present time) the fundamental problem of international politics. This may be seen from the following:

> "The world is in crisis. Capitalism, the prevailing system of society, is in process of disintegration and collapse. Out of its vitals is developing a new social order, the system of Communist Socialism; and the struggle between this new social order and the old is NOW the fundamental problem of international politics.
>
> "The predatory 'war for democracy' dominated the world. But NOW it is the revolutionary proletariat in action that dominates, conquering power in some nations, mobilizing to conquer powers in others, and calling upon the proletariat of all nations to prepare for the final struggle against Capitalism.
>
> "But Socialism itself is in crisis. Events are revolutionizing Capitalism *and Socialism* —an indication that this is the historic epoch of the proletarian revolution. Imperialism is the final stage of Capitalism; and Imperialism means sterner reaction and new wars

> of conquest—UNLESS the revolutionary proletariat acts for Socialism. Capitalism cannot reform itself; it cannot be reformed. Humanity can be saved from its last excesses only by the Communist Revolution. There can NOW be only the Socialism which is one in temper and purpose with the proletarian revolutionary struggle. There can be only the Socialism which units the proletariat of the WHOLE WORLD in the general struggle against the desperately destructive Imperialisms—the Imperialisms which array themselves as a single force against the ONSWEEPING PROLETARIAN REVOLUTION."

There must be new wars unless the revolutionary socialist succeeds in his design:

> "New problems of power must necessarily arise, producing new antagonisms, new wars of aggression and conquest—unless the revolutionary proletariat CONQUERS in the struggle for Socialism."

Under the subtitle "The Collapse of the International" in column 3, pages 6, the manifesto clearly suggests that it is the duty of revolutionary socialists to begin a civil war in every country that dared to go to war with any other country; and that the socialists who voted war credits to the nations that went to war in 1914 betrayed the cause of socialism and repudiated the resolution adopted by the Socialist International Congress of Basle that had threatened the governments with Parisian communes in the event any of them declared war upon any other nation. The statement is also made that during a war is the precise time for the proletariat to conquer power. This may be seen from the following, which is quoted from the manifesto:

"THE COLLAPSE OF THE INTERNATIONAL.

In 1912, at the time of the first Balkan war, Europe was on the verge of a general imperialistic war. A Socialist International Congress was convened at Basle to act on the impending crisis. The resolutions adopted *stigmatized the coming war* AS IMPERIALISTIC AND AS UNJUSTIFIABLE ON ANY *pretext of national interest.* The Basle resolution declared:

1. That the war would create an economic and political crisis; 2. That the workers would look upon participation in the war as a crime, which would arouse 'indignation and revulsion' among the masses; 3. That the crisis and the psychological condition of the workers would create a situation that Socialists should use 'to rouse the masses and hasten the downfall of Capitalism'; 4. That the governments 'fear a proletarian revolution' and should remember the Paris Commune and the revolution in Russia in 1905, that is, a civil war.

The Basle resolution indicted the coming war as imperialistic, a war necessarily to be opposed by Socialism, which would use the opportunity of war to wage the revolutionary struggle against Capitalism. The policy of Socialism was comprised in the struggle to transform the imperialistic war into a civil war of the oppressed against the oppressors, and for Socialism.

The war that came in 1914 was the same imperialistic war that might have come in 1912, or at the time of the Agadir crisis. But, upon the declaration of war, *the dominant Socialism, contrary to the Basle resolution, accepted and justified the war.*

• • • • • • •

> The dominant Socialism favored the war; a small minority adopted a policy of petty bourgeois pacifism; and only the LEFT WING GROUPS adhered to the policy of revolutionary Socialism.
>
> * * * * * * *
>
> The Basle Manifesto simply required opposition to the war and the fight to develop out of its circumstances the revolutionary struggle of the proletariat against the war and Capitalism.
>
> * * * * * * *
>
> The class struggle comes to a climax during war. National struggles are a form of expression of the class struggle, whether they are revolutionary wars for liberation or imperialistic wars for spoilation. It is precisely during a war that material conditions provide the opportunity for waging the class struggle to a conclusion for the conquest of power."

Moderate socialists are condemned because they abandoned militant revolutionary tactics:

> "MODERATE SOCIALISM.
>
> The Socialism which developed as an organized movement after the collapse of the revolutionary First International was moderate, petty bourgeois Socialism. It was a Socialism adapting itself to the conditions of national development, abandoning in practice the MILLITANT idea of revolutionizing the old world."

They are also condemned for their peaceful tactics:

> "Evading the actual problems of the revolutionary struggle, the dominant Socialism of the Second International developed into a

> PEACEFUL movement of organization, of trades union struggles, of co-operation with the middle class, of legislation and bourgeois State Capitalism as means of introducing Socialism."

They are further condemned because they believed in reforms and using the parliaments instead of destroying the state:

> "The dominant Socialism expressed this unity, developing a policy of LEGISLATIVE REFORMS and State Capitalism, making the revolutionary class struggle a parliamentary process.
>
> This developing meant, obviously, the abandonment of fundamental Socialism. It meant working on the basis of the BOURGEOIS PARLIAMENTARY STATE, instead of the struggle TO DESTROY THAT STATE; it meant the 'co-operation of classes' for State Capitalism, instead of the uncompromising proletarian struggle for Socialism."

The Mensheviki of Russia, whose leader, Kerensky, overthrew the government of the Czar and set up a democratic-republic parliamentary state, and the Social Democrats of Germany, who likewise set up a parliamentary republic, are roundly condemned for their failure to destroy all vestige of the bourgeois parliamentary state; while on the other hand the Bolsheviki; who by revolutionary methods conquered and destroyed Kerensky's democratic republic in Russia, and the Spartacide Communists of Germany, who likewise sought to overthrow the Social Democrats in Germany by similar revolutionary tactics, are held up as the proper ideal for revolutionary socialists:

The dominant Socialism justified its acceptance of the war on the plea that a revolution did not materialize, that the masses abandoned Socialism.

This was conscious subterfuge. When the economic and political crisis DID develop potential revolutionary action in the proletariat, the dominant Socialism immediately assumed an attitude AGAINST the revolution. The proletariat was urged NOT to make a revolution. The dominant Socialism united with the capitalist governments to prevent a revolution.

The Russian revolution was the first act of the proletariat against the war and Imperialism. But while the masses made the revolution in Russia, the bourgeois usurped power and organized the regulation bourgeois-parliamentary republic. This was the first stage of the revolution. Against this bourgeois republic organized the forces of the proletarian revolution. Moderate Socialism in Russia, represented by the Mensheviki and the Social-Revolutionists, acted against the proletarian revolution. It united with the Cadets, the party of bourgeois Imperialism, in a coalition government of bourgeois democracy. It placed its faith in the war 'against German militarism,' in national ideals, in parliamentary democracy and the 'co-operation of classes.'

But the proletariat, urging on the poorer peasantry, conquered power. It accomplished a proletarian revolution by means of the Bolshevik policy of 'all powers to the Soviets'—organizing the new transitional state of proletarian dictatorship. Moderate Socialism, even after its theory that a proletarian revolution was impossible had been shattered

by life itself, acted against the proletarian revolution and mobilized the counter-revolutionary forces against the Soviet Republic—assisted by the moderate Socialism of Germany and the Allies."

* * * * * * *

The revolution in Germany decided the controversy. The first revolution was made by the masses against the protest of the dominant moderate Socialism, represented by the Social-Democratic Party. As in Russia, the first stage of the Revolutionary realized a bourgeois parliamentary republic, with power in the hands of the Social-Democratic Party. Against this, bourgeois republic organized a new revolution, the proletarian revolution directed by the Spartacan-Communists. And, precisely as in Russia, *the dominant moderate Socialism opposed the proletarian revolution,* opposed all power to the Soviets, accepted parliamentary democracy and repudiated proletarian dictotorship."

Moderate Socialism believes in the democratic parliamentary state to introduce socialism; while Revolutionary Socialism rejects the parliamentary state and declares that that state must be destroyed.

"There is, accordingly, a common policy that characterizes moderate Socialism, and that is *its conception of the state.* Moderate Socialism affirms that the bourgeois, democratic parliamentary state is the necessary basis for the introduction of Socialism; accordingly, it conceived the task of the revolution, in Germany and Russia, to be the construction of the democratic parliamentary state, after which the process of introducing Socialism by legislative reform measures could be initiated. Out of this conception of the state developed the counter-revolutionary policy of moderate Socialism.

> Revolutionary Socialism, on the contrary, insists that the democratic parliamentary state can never be the basis for the introduction of Socialism; that it is necessary to destroy the parliamentary state, and construct a new state of the organized producers, which will deprive the bourgeoisie of political power, and function as a revolutionary dictatorship of the proletariat.
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> • • • • • • •
>
> Revolutionary Socialism alone is capable of mobilizing the proletariat for Socialism, for the conquest of the power of the state, by means of revolutionary mass action and proletarian dictatorship."

The Socialists of America are condemned as moderates who failed to take advantage of the recent war in which the United States participated and during which revolutionary socialism, according to the Manifesto, had a chance to conquer power:

> "The dominant moderate Socialism of the International was equally the Socialism of the American Socialist Party.
>
> • • • • • • •
>
> The war and the proletarian revolution in Russia provided the opportunity. The Socialist Party, under the impulse of its membership, adopted a MILITANT declaration against the war. But the officials of the party sabotaged this declaration. The *official* policy of the party on the war was a policy of petty bourgeois pacifism.
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> • • • • • • •
>
> This policy necessarily developed into a repudiation of the revolutionary Socialist position. When events developed the test of accepting or rejecting the revolutionary implications of the declaration against the war, the party bureaucracy immediately exposed its reactionary policy, by repudiating the

policy of the Russian and German Communists, and refusing affiliation with the Communist International of revolutionary Socialism."

The United States is becoming an autocratic government preparing for aggression and conquest; but it is approaching a crisis in the days to come which modify the immediate task of the revolutionary socialist. It will be noted that they say, "These conditions modify *our* immediate task." American capitalism is declared to be brutally terrorizing the militant proletariat which condition will produce proletariat action against capitalism (the state). Strikes are developing wherein the workers strive to usurp the functions of government. The revolutionary socialists will use these strikes, broaden them, make them militant for a final struggle against the state. Again, "Revolutionary Socialism must use these mass revolts"; "must base itself on the mass struggle"; "our task is to encourage the militant"; "our task is to articulate and organize the proletariat":

"Problems of American Socialism.

Imperialism is dominant in the United States, which is now a world power. It is developing a centralized, autocratic federal government, acquiring the financial and military reserves for aggression and wars of conquest. The war has aggrandized American Capitalism, instead of weakening it as in Europe. But world events will play upon and influence conditions in this country—dynamically, the sweep of revolutionary proletarian ideas; materially, the coming construction of world markets upon the resumption of competition. Now all-mighty and su-

preme, Capitalism in the United States MUST meet crises IN THE DAYS TO COME. These conditions modify our immediate task, but do not alter its general character; this is not the moment of revolution, but it is the moment of revolutionary struggle. American Capitalism is developing *a brutal campaign of terrorism* against *the militant proletariat.* American Capitalism is utterly incompetent on the problems of reconstruction that press down upon society. Its 'reconstruction' program is simply to develop its power for aggression, to aggrandize itself in the markets of the world.

"These conditions of Imperialism and of multiplied aggression *will necessarily produce proletarian action against Capitalism.* Strikes are developing which verge on revolutionary action, and in which t*he suggestion of proletarian dictatorship is apparent,* the striker-worker is trying to usurp functions of municipal government as in Seattle and Winnipeg. The mass struggle of the proletariat *is* coming into being.

* * * * *

But there is a more vital tendency,—the tendency of the workers to initiate mass strikes,—strikes which are equally a revolt against the bureaucracy in the unions and against the employers. These strikes WILL constitute the determining FEATURE of proletarian action IN THE DAYS TO COME. REVOLUTIONARY SOCIALISM *MUST use* THESE MASS industrial revolts TO BROADEN THE STRIKE, to make it general and MILITANT; use the strike for PLITICAL OBJECTIVES, and, finally, DEVELOP THE MASS POLITICAL STRIKE AGAINST CAPITALISM AND THE STATE.

Revolutionary Socialism MUST base itself on the mass struggles of the proletariat, engage directly in these struggles while emphasizing the revolutionary purposes of So-

cialism and the proletarian movement. The mass strikes of the American proletariat PROVIDE THE MATERIAL BASIS OUT OF WHICH TO DEVELOP THE CONCEPTS AND ACTION OF REVOLUTIONARY SOCIALISM.

OUR TASK is to encourage the militant mass movements in the A. F. of L. to split the old unions, to break the power of unions which are corrupted by Imperialism and betray the militant proletariat. The A. F. of L., in its dominant expression, is united with Imperialism. A bulwark of reaction,—it must be exposed and its power for evil broken.

OUR TASK, moreover, is to articulate and organize the mass of the unorganized industrial proletariat, which *constitutes the basis* for a *militant* Socialism. The struggle for the revolutionary industrial unionism of the proletariat becomes an indispensable phase of revolutionary Socialism, on the basis of which to broaden and *deepen the action* of the militant proletariat *developing reserves for the ultimate conquest of power.*

Imperialism *IS* dominant in the United States. It controls all the factors of social action. Imperialism is uniting all non-proletarian social groups in a brutal state Capitalism for reaction of spoilation. Against this, revolutionary Socialism MUST MOBILIZE the mass struggle of the industrial proletariat.

Moderate Socialism is comprising, vacillating, treacherous, because the social elements it depends upon—the *petite bourgeoisie* and the aristocracy of labor—are not a fundamental factor in society; they vacillate between the bourgeois and the proletariat, their social instability produces political instability; and, moreover, they have been seduced by Imperialism and are now united with Imperialism.

Revolutionary Socialism is resolute, uncompromising, revolutionary, because it builds upon a fundamental social factor, the industrial proletariat, which is an actual producing class, expropriated of all property, in whose consciousness the machine process has developed the concepts of industrial unionism and mass action. Revolutionary Socialism adheres to the class struggle because through the class struggle alone—the mass struggle—can the industrial proletariat secure immediate concessions and finally conquer power by organizing the industrial government of the working class."

Revolutionary Socialism does not propose to capture the bourgeois state, but to conquer and destroy it. The bourgeois parliamentary state never can be the basis for the introduction of Socialism:

"POLITICAL ACTION.

The class struggle is a political struggle. It is a political struggle in the sense that its objective is political—the overthrow of the political organization upon which capitalistic exploitation depends, and the introduction of a new social system. The direct objective is the conquest by the proletariat of the power of the state.

Revolutionary Socialism *does not* propose to 'capture' the bourgeois parliamentary state, but to conquer and destroy it. Revolutionary Socialism, accordingly REPUDIATES the policy of introducing Socialism by means of legislative measures on the basis of the bourgeois state. This state is a bourgeois state, the organ for the coercion of the proletrian by the capitalist: how, then, can it introduce Socialism? As long as the bourgeois parliamentary state prevails, the capi-

talist class can baffle the will of the proletariat, since all the political power, the army and the police, industry and the press, *are* in the hands of the capitalists, whose economic power gives them complete domination. The revolutionary proletariat *MUST* expropriate all these by the conquest of the power of the state, by annihilating the political power of the bourgeoisie, before it can begin the task of introducing Socialism.

Revolutionary Socialism, accordingly, PROPOSES to conquer the power of the state. It proposes to conquer by means of political action,—political action in the revolutionary Marxian sense, which does not simply mean parliamentarism, but the *class action* of the proletariat IN ANY FORM having as its objective the conquest of the power of the state.

* * * * * *

But parliamentarism cannot conquer the power of the state for the proletariat. The conquest of the power of the state is an extra-parliamentary act. It is accomplished, not by the legislative representatives of the proletariat, but BY THE MASS POWER OF THE PROLETARIAT IN ACTION. The supreme power of the proletariat inheres in the *political mass strike* in using the industrial mass power of the proletariat for political objectives.

Revolutionary Socialism, accordingly, recognizes that the supreme form of proletarian political action is the *political mass strike.*

* * * * *

Under the impact of industrial concentration, the proletariat developed its own dynamic tactics—mass action.

Mass action is the proletarian response to the facts of modern industry, and the forms it imposes upon the proletarian class struggle. Mass action starts as the spontaneous activity of unorganized workers massed in the

basic industry; its initial form is the mass strike of the unorganized proletariat.

* * * * * *

Mass action is industrial in its origin; but its development imposes upon it a political character, since the more general and conscious mass action becomes the more it antagonizes the bourgeois state, becomes *political* mass action."

At the moment of crisis in capitalism the revolutionary acts to conquer power by mass action —the strike:

"The proletarian revolution comes at the moment of CRISIS in Capitalism, of a collapse of the old order. Under the impulse of the CRISIS, the proletariat ACTS for the conquest of power, by means of mass action. MASS ACTION concentrates and mobilizes the forces of the proletariat, organized and unorganized; it acts equally against the bourgeois state and the conservative organizations of the working class. The REVOLUTION STARTS with STRIKES of PROTEST, DEVELOPING into mass POLITICAL STRIKES and then into REVOLUTIONARY mass action for the conquest of THE POWER of the state. Mass action becomes political in purpose while extra-parliamentary in form; it is equally a process of revolution and the revolution itself in operation.

The final objective of mass action is the conquest of the power of the state, the annihilation of the bourgeois parliamentary state and the introduction of the transition proletarian state, functioning as a revolutionary dictatorship of the proletariat."

The revolutionary must destroy the state and suppress the bourgeoisie:

"The state is an organ of coercion. The bourgeois parliamentary state is the organ

of the bourgeoisie for the coercion of the proletariat. The revolutionary proletariat MUST, accordingly, *destroy* this state. But the conquest of political power by the proletariat does not immediately end Capitalism, or the power of the capitalists, or immediately socialize industry. It is therefore necessary that the proletariat organize its own state *for the coercion and suppression of the bourgeoisie.*"

The dictatorship of the proletariat must suppress the bourgeoisie; expropriate it politically and economically; repudiate national debts; loot the trust companies and banks:

"Proletarian dictatorship is a recognition of the necessity for a revolutionary state to coerce and suppress the bourgeoisie; it is equally a recognition of the fact that, in the Communist reconstruction of society, the proletariat as a class alone counts. The new society organizes as a communistic federation of producers. The proletariat alone counts in the revolution, and in the reconstruction of society on a Communist basis.

The old machinery of the state cannot be used by the revolutionary proletariat. It must be destroyed. The proletariat creates a new state, based directly upon the industrially organized producers, upon the industrial unions or Soviets, or a combination of both. It is this state alone, functioning as a dictatorship of the proletariat, that can realize Socialism.

The tasks of the dictatorship of the proletariat are:

(a) to completely expropriate the bourgeoisie politically, and crush its powers of resistance.

(b) to expropriate the bourgeoisie economically, and introduce the forms of Communist Socialism.

* * * * *

But this political expropriation proceeds simultaneously with an immediate, if partial, expropriation of the bourgeoisie economically, the scope of these measures being determined by industrial development and the maturity of the proletariat. These measures, at first, include:

(a) Workmen's control of industry, to be exercised by the industrial organizations of the workers, operating by means of the industrial vote.

(b) Expropriation and nationalization of the banks, as a necessary preliminary measure for the complete expropriation of capital.

(c) Expropriation and nationalization of the large (trust) organizations of capital. Expropriation proceeds without compensation, as 'buying out' the capitalists is a repudiation of the tasks of the revolution.

(d) Repudiation of all national debts and the financial obligations of the old system.

(e) The nationalization of foreign trade.

(f) Measures for the socialization of agriculture."

The Communist International represents the revolutionary class struggle and calls the proletariat to the final struggle against the state:

"The Communist International, on the contrary represents a Socialism in complete accord with the revolutionary character of the class struggle. It unites all the consciously revolutionary forces. It wages war equally

against the dominant moderate Socialism and Imperialism—each of which has demonstrated its complete incompetence on the problems that now press down upon the world. The Communist International issues its challenge to the conscious, virile elements of the proletariat, calling them to the *final struggle* against Capitalism on the basis of the revolutionary epoch of Imperialism."

The acceptance of the Communist International "is decisive in OUR activity":

> "The acceptance of the Communist International means accepting the fundamentals of revolutionary Socialism as decisive in OUR ACTIVITY.
>
> The Communist International, moreover, issues its call to the subject peoples of the world, crushed under the murderous mastery of Imperialism. The revolt of these colonial and subject peoples is a necessary phase of the world struggle against Capitalist Imperialism; their revolt must unite itself with the struggle of the conscious proletariat in the imperialistic nations. The Communist International, accordingly, offers an organization and a policy that may unify all the revolutionary forces of the world for the conquest of power, and for Socialism."

Finally, the Manifesto calls all proletarians to the struggle. "The old order is in decay"—"Civilization is in collapse"—The proletariat revolution and the reconstruction of society—the struggle for these—is NOW indispensable. "This is the message of the Communist International to the workers of the world. THE COMMUNIST INTERNATIONAL CALLS THE PROLETARIAT OF THE WORLD TO THE FINAL STRUGGLE."

Supreme Court of the United States

OCTOBER TERM, 1922.

No. ~~770.~~ ~~1922~~ 19

BENJAMIN GITLOW,
Plaintiff-in-Error,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Defendants-in-Error.

BRIEF FOR THE STATE OF NEW YORK.

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INDEX TO CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1922.

No. 770.

BENJAMIN GITLOW,
Plaintiff-in-Error,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Defendants-in-Error.

Brief of the State of New York in Support of the Constitutionality of Sections 160 and 161 of the Penal Law of the State of New York (Chapter 371 of the Laws of 1902).

Statement of Facts.

The legislature of the State of New York at its session in the year 1902 passed an act defining criminal anarchy and providing for the punishment of certain acts of criminal anarchy. The law was approved by the Governor and became effective April 3, 1902 (Chapter 371 of the Laws of the State of New York of 1902). That statute is now a part of the Penal Law of the State of New York

and Sections 160 and 161, which are the only ones with which we are concerned, read as follows:

"Sec. 160. *Criminal anarchy defined.* Criminal anarchy is the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means. The advocacy of such doctrine either by word of mouth or writing is a felony.

"Sec. 161. *Advocacy of criminal anarchy.* Any person who:

"1. By word of mouth or writing advocates, advises or teaches the duty, necessity or propriety of overthrowing or overturning organized government by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means; or,

"2. Prints, publishes, edits, issues or knowingly circulates, sells, distributes or publicly displays any book, paper, document, or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means; or,

"3. Openly, wilfully and deliberately justifies by word of mouth or writing the assassination or unlawful killing or assaulting of any executive or other officer of the United States or of any state or of any civilized nation having an organized government because of his official character, or any other crime, with intent to teach, spread or advocate the propriety of the doctrines of criminal anarchy; or,

"4. Organizes or helps to organize or becomes a member of or voluntarily assembles with any society, group or assembly of per-

sons formed to teach or advocate such doctrine,

"Is guilty of a felony and punishable by imprisonment for not more than ten years, or by a fine of not more than five thousand dollars, or both."

On July 5, 1919 the plaintiff-in-error (hereinafter referred to as the defendant) published and thereafter circulated a publication called "The Revolutionary Age," containing an article entitled "The Left Wing Manifesto" (pp. 171 and 172).

Thereafter and in November, 1919, the defendant was indicted by the grand jury of New York County for having violated the above quoted sections of the Penal Law (fols. 37-149). The text of the published article appears in the indictment (fols. 40-142).

The defendant was duly tried and convicted of such crime by a jury and sentenced to serve not less than five years and not more than ten years in State Prison (fols. 151-156).

From such conviction an appeal was taken to the Appellate Division of the State of New York, First Department, where the conviction was unanimously affirmed (fols. 157-160).

The opinion of the Appellate Division was written by Mr. Justice Laughlin and appears in the record at folios 171-293. Thereafter an appeal

was taken to the Court of Appeals of the State of New York, where the conviction was again affirmed (fols. 295-302).

The prevailing opinion written by Judge Crane appears at folios 305-340; a concurring opinion by Chief Judge Hiscock appears at folios 341-374; a dissenting opinion written by Judge Pound at folios 375-391.

Judges Hogan, McLaughlin and Andrews concurred with the prevailing opinions. Judge Cardozo concurred with the dissenting opinion (fol. 392).

The dissenting opinion was upon the ground that the publication did not actually violate the statute. None of the judges in either the Appellate Division or Court of Appeals arrived at the conclusion that the statute was unconstitutional.

A writ of error was granted by this court (pp. 165-166) and it is on that writ that this case is now before the court.

The assignments of errors (fols. 416-428) are eleven in number. The first five are the only ones involving the question of the constitutionality of the statute and all of them are directed to the same point and are merely motions made in the course of the trial, based on the proposition that the statute under which the defendant was indict-

ed and tried is unconstitutional in that it is in contravention of that clause of the fourteenth amendment of the Constitution of the United States which provides:

> "nor shall any State deprive any person of life, liberty or property without due process of law."

Whether or not the defendant was guilty of violating this statute and whether or not errors were committed on the trial of the action are questions which do not properly concern this office. It is our duty only to uphold the constitutionality of the statute.

In passing, however, it may be said that the defendant can scarcely be said to urge in his brief that he did not violate the statute nor that any errors were committed on the trial. Indeed those questions were settled by the Court of Appeals. Therefore, this brief will be directed entirely to the question of whether or not the statute violates the above quoted clause of the fourteenth amendment.

POINT I.

Freedom of speech and of the press is subject to control by penal statutes.

Numerous penal statutes punishing the saying or publishing of forbidden matter have been held constitutional; otherwise no statute forbidding

profanity, obscenity, the advocacy of murder or treason would be constitutional.

Fox vs. Washington, 236 U. S. 273.
Gilbert vs. Minnesota, 254 U. S. 325.
Schenck vs. U. S., 249 U. S. 47.

POINT II.

The limitations on the states contained in the Fourteenth Amendment is only as to rights granted to citizens of the United States by its constitution or statutes.

Presser vs. Illinois, 116 U. S. 252.

At page 266 the court says:

> "It is only the privileges and immunities of citizens of the United States that the clause relied on was intended to protect. A State may pass laws to regulate the privileges and immunities of its own citizens, provided that in so doing it does not abridge their privileges and immunities as citizens of the United States. * * * * The question is, therefore, had he a right as a citizen of the United States, in disobedience of the State Law, to associate with others as a military company, and to drill and parade with arms in the towns and cities of the State? *If the plaintiff in error has any such privilege he must be able to point to the provision of the Constitution or statutes of the United States by which it is conferred.*" (Italics are ours).

POINT III.

The first amendment of the Constitution does not, by virtue of the adoption of the Fourteenth Amendment, curtail the rights of the states to limit the freedom of speech and of the press.

Maxwell vs. Dow, 176 U. S. 581.
U. S. vs. Cruikshank, 92 U. S. 542.

At page 552 the court says:

"The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States."

POINT IV.

There is no common law right of citizens to free speech other than the English common law.

Smith vs. Alabama, 124 U. S. 465.

We quote from page 478:

"There is no common law of the United States, in the sense of a national customary

law, distinct from the common law of England as adopted by the several States each for itself, applied as its local law, and subject to such alteration as may be provided by its own statutes."

And again on the same page it is said:

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."

Robertson vs. Baldwin, 165 U. S. 275.

Quoting from page 281:

" * * * The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally ex-

pressed. Thus, the freedom of speech and of the press (Art. 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurous to public morals or private reputation."

It is conceded in appellant's brief that under the English common law the defendant would not have been immune from punishment for the publication in question.

This court has held specifically that there is no national common law other than the English common law as expressed in the constitution and its amendments. It follows, therefore, that unless there is some express prohibition on the State of New York it had the constitutional right to pass the statute now being challenged. We have also shown that there is no such prohibition. The first amendment was purely a limitation on the power of Congress and that limitation has not been extended to the States by the fourteenth amendment.

POINT V.

Similar legislation has been held constitutional.

Fox vs. Washington, 236 U. S. 273.
Gilbert vs. Minnesota, 254 U. S. 325.

The statute in the Fox case was as follows:

"Every person who shall wilfully print, publish, edit, issue, or knowingly circulate,

> sell, distribute or display any book, paper, document, or written or printed matter, in any form, advocating, encouraging or inciting, or having a tendency to encourage or incite the commission of any crime, breach of the peace or act of violence, or which shall tend to encourage or advocate disrespect for law or for any court or courts of justice, shall be guilty of a gross misdemeanor."

We find nothing in that statute which provides that the "advocating" of certain doctrine must result in actual breach of the peace or that such doctrine must be advocated under circumstances which are likely to occasion breach of the peace yet it was held constitutional.

In the Gilbert case, the statute under discussion was as follows (page 326):

> "Sec. 2. Speaking by word of mouth against enlistment unlawful.—It shall be unlawful for any person in any public place, or at any meeting where more than five persons are assembled, to advocate or teach by word of mouth or otherwise that men should not enlist in the military or naval forces of the United States or the state of Minnesota.
>
> "Sec. 3. Teaching or advocating by written or printed matters against enlistment unlawful.—It shall be unlawful for any person to teach or advocate by any written or printed matter whatsoever, or by oral speech, that the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States."

This statute clearly was intended to prohibit the teaching or advocating a doctrine as such without limiting it as to time, place or circumstances. This court held the statute constitutional. The dissenting opinion in that case points out clearly the effect of the statute in the following language (we quote from page 334):

> "The Minnesota statute was enacted during the World War; but it is not a war measure. The statute is said to have been enacted by the State under its police power to preserve the peace;—but it is in fact an act to prevent teaching that the abolition of war is possible. Unlike the Federal Espionage Act of June 15, 1917, c. 30, 40 Stat. 217, 219, it applies equally whether the United States is at peace or at war. It abridges freedom of speech and of the press, not in a particular emergency, in order to avert a clear and present danger, but under all circumstances. The restriction imposed relates to the teaching of the doctrine of pacifism and the legislature in effect proscribes it for all times. The statute does not in terms prohibit the teaching of the doctrine. Its prohibition is more specific and is directed against the teaching of certain applications of it. This specification operates, as will be seen, rather to extend, than to limit the scope of the prohibition."

It, therefore, must be assumed that this court arrived at its conclusion in holding the statute constitutional with full understanding of the effect of such decision.

Appellant urges that both in the Fox case and the Gilbert case and in the cases under the Fed-

eral Espionage Act the peculiar circumstances under which the offenses were committed gave rise to the decisions holding the acts constitutional. We cannot subscribe to any such reasoning.

It is familiar doctrine that a statute may be held constitutional in part and unconstitutional in part, but it is a strange doctrine that a statute may be constitutional sometimes and unconstitutional at other times, depending on the state of the public mind or the state of the weather.

POINT VI.

The statute in question is a valid exercise of the police power of the state.

Counsel for defendant on page 20 of his brief points out clearly the reason why the statute in question is a proper limitation by the state upon the right of free speech. He says in speaking of the advocate of doctrines prohibited by the statute:

> "His views may be silly, his remedies preposterous. Their mere utterance creates some danger that unthinking members of the community may undertake to act upon them. But he is not to be punished either for their foolishness or for the danger incident to mere utterance—for the danger inherent in the doctrines themselves, as distinct from a danger arising from their utterance in particular circumstances."

The State of New York learned by tragic experience the "danger that unthinking members of the community may undertake to act upon them."

In the fall of 1901 President McKinley visited the Pan American Exposition at Buffalo. There was no public unrest; there was no state of war; there were no great strikes or riots in progress; there was no reason to apprehend any anarchistic teachings would cause a great public disaster; yet an "unthinking member of the community" did "undertake to act upon them", and the President was murdered, not because the assassin had any personal grievance against him, but simply because he represented organized government.

The People of the State of New York discovered, much to their chagrin, that the real perpetrators of the crime, Emma Goldman and her like, could not be punished, for want of any statute forbidding the teaching of the silly doctrine which caused a silly man to murder the President.

The next session of the legislature of the State of New York passed the act now being attacked. If the act had contained the limitations which it is contended were necessary to make it constitutional; that is, that the propaganda sought to be forbidden must be such as to cause danger of a particular breach of the peace, or a breach of the

peace by some certain person or at a particular time or place or against some certain person or persons, then of course it could not have accomplished the object for which it was passed; that is to prevent the dissemination of a doctrine as such, which working insidiously on a perverted mind would cause another tragedy, perhaps not of the same kind, but nevertheless a tragedy which it is the duty of the state to avoid if possible.

Counsel's statements that he who promulgates such dangerous doctrines, which work upon the minds of "unthinking members of the community" so that they may cause some great public calamity "is not to be punished either for their foolishness or for the danger incident to mere utterance," does not logically follow.

It is the height of folly to punish only the unthinking perpetrators of the crime after it has been committed and let the real criminal, the instigator of the crime who by his "doctrine *qua* doctrine," under the guise of liberty of speech and freedom of the press, has brought about such a state of mind in some of his less well balanced hearers or readers as to make such a crime possible.

Reduced to its simplest terms the statute forbids the advocacy of murder and treason. Surely the state has the right to protect itself, and the

government of which it is a part, from assaults or from the advocacy of assaults intended to overthrow the very constitutions and governments which such advocates attempt to hide behind for protection. Surely the state has a right to pass laws prohibiting doctrines, the necessary result of which has been and is violence and disorder.

POINT VII.

The judgment of this court should uphold the constitutionality of the statute under which the defendant was convicted; and there being no question of the violation of that statute by the defendant and that he had a fair trial, by all the due processes of law, the judgment of conviction should be affirmed.

Respectfully submitted,

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